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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re TOMMY M., a Person Coming
Under the Juvenile Court Law.

B302295
(Los Angeles County
Super. Ct. No. 18CCJP06722)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN
AND FAMILY SERVICES,

Plaintiff and Appellant,

v.

L.S.,

Defendant and Respondent.

APPEAL from an order of the Superior Court of
Los Angeles County, Michael E. Whitaker, Judge. Reversed.

Mary C. Wickham, County Counsel, Kristine P. Miles,
Assistant County Counsel, and Brian Mahler, Deputy County
Counsel, for Plaintiff and Appellant.

Caitlin Christian, under appointment by the
Court of Appeal, for Defendant and Respondent L.S.

This appeal concerns the juvenile court’s designation of Michael M. (Michael) as Tommy M.’s (Tommy) presumed father under Family Code section 7611, subdivision (d). Presumed father status in a dependency proceeding entitles the father to appointed counsel, and potentially custody and reunification services. (*In re T.R.* (2005) 132 Cal.App.4th 1202, 1209.) “A presumed ‘father’s rights flow from his relationship (or attempted relationship) to the mother and/or child and not merely from his status as the biological father.’ [Citation.] The presumed father’s *commitment* to the child is a key consideration.” (*Id.* at p. 1210, italics added.) Family Code “‘[s]ection 7611, subdivision (d) . . . requires something more than a man’s being the mother’s casual friend or long-term boyfriend; he must be “someone who has entered into a familial relationship with the child: someone who has demonstrated an abiding commitment to the child and the child’s well-being” regardless of his relationship with the mother.’ [Citation.] In other words, the child’s physical presence within the alleged father’s home is, by itself, insufficient under section 7611, subdivision (d).” (*W.S. v. S.T.* (2018) 20 Cal.App.5th 132, 144–145.)

In this case, the juvenile court rejected the Los Angeles County Department of Children and Family Services’ (DCFS) argument that Michael “hasn’t done anything active to be a parent in this child’s life.” The court incorrectly stated, “That’s not what is required under the law.” The court did not recognize that “[t]o qualify under [Family Code section 7611,]

subdivision (d), a person must have a ‘fully developed parental relationship’ with the child.” (*In re Alexander P.* (2016) 4 Cal.App.5th 475, 485.)

No substantial evidence supported the juvenile court’s order elevating Michael from an alleged father to a presumed father. Michael has an almost three-decade criminal history and was incarcerated when the dependency proceedings commenced. There was no evidence Michael had any relationship with Tommy, let alone a familial relationship. There was no evidence Michael had any commitment to Tommy, let alone an abiding commitment. Michael carried the burden of showing he merited presumed father status, but he chose not to appear at the hearing to determine whether he was a presumed father. Michael also filed no brief on appeal. We reverse the juvenile court’s order finding Michael to be Tommy’s presumed father.

BACKGROUND

1. *DCFS Petitions*

On October 18, 2018, DCFS filed a Welfare and Institutions Code¹ section 300 (section 300) petition identifying Tommy (born in September 2016), as a dependent of the juvenile court. At the time the petition was filed, mother was Tommy’s custodial parent and had a newborn child, K.² The juvenile court dismissed the forgoing section 300 petition.

¹ Undesignated statutory citations are to the Welfare and Institutions Code.

² K.’s father, who is not Tommy’s father, admitted to using methamphetamine and marijuana for an extended period of time.

The amended section 300 petition alleged that mother's male companion and K.'s father, Steven, abused methamphetamine and marijuana, rendering him incapable of caring for K. DCFS further alleged that mother knew of Steven's substance abuse and failed to protect Tommy.

With respect to Tommy's father, Michael, DCFS alleged that he failed to provide Tommy with the necessities of life and that his whereabouts were unknown.

The juvenile court sustained the amended petition and ordered the children remain in mother's home with family maintenance services.

On April 26, 2019, DCFS filed a supplemental petition. As later sustained, the petition alleged that mother failed to comply with juvenile court orders and allowed K.'s father to have unlimited access to the children and to reside in the family home. DCFS further alleged that mother failed to participate in court ordered programs including individual counseling and an Alanon program.

Mother pleaded no contest to the supplemental petition, and the juvenile court ordered Tommy and K. removed from mother's custody.

2. *According to Mother, Michael Had No Relationship With Tommy*

In October 2018, mother reported that Michael was Tommy's biological father. Mother and Michael had a seven-month relationship. According to mother, Michael used controlled substances. Michael had a 28-year criminal history including possession of a controlled substance, selling or transporting a controlled substance, and robbery.

Mother reported that Michael was incarcerated during her pregnancy with Tommy, and Michael “has not had any contact with his son Tommy.” Mother also reported that Michael “never” participated in Tommy’s life. In November 2018, mother stated that she had no “contact or communication” with Michael or any of his family members in over two years. According to mother, Michael was incarcerated when Tommy was born. Mother reported that Michael “has not made any contact with his son Tommy or myself. I provide for Tommy The father [Michael] doesn’t provide for Tommy and he has not come around asking for him.’”

Mother completed a parentage questionnaire, and in it, she stated that Michael was not present at Tommy’s birth because he had “been in jail for 2 years.” Mother stated that Michael had not received Tommy into his home, but he had acknowledged being Tommy’s father. Mother signed the questionnaire under penalty of perjury.

3. *Michael Appears and Then Seeks Presumed Father Status*

DCFS reported that Michael was serving a 32-month sentence with a release date of May 26, 2019. DCFS also reported that Michael spoke to mother and Tommy on May 29, 2019 about scheduling a visit. There was no evidence Michael actually visited Tommy.

Michael first appeared in the dependency proceedings on May 31, 2019. Michael’s counsel indicated that Michael had just been released from a two-year prison sentence. (The record does not clarify whether Michael’s sentence was two years or 32 months.)

Also on May 31, 2019, the only day Michael appeared in court, Michael completed an unsworn statement of parentage. Michael indicated that he believed he was Tommy's parent. Michael further represented that he told his friends and family he was Tommy's father and Tommy lived with him from "10/2016 to 12/2016." Michael stated that he participated in "[d]octor's appointments [and] recreational activities" with Tommy. Michael further stated that he provided Tommy with clothes, diapers, [and] childcare products. Michael identified no date on which he provided these items or participated in Tommy's activities.

On June 19, 2019, Michael's counsel filed a section 388 petition to change a court order. Counsel argued that Michael did not have adequate notice of the jurisdictional and dispositional hearings. Michael's counsel represented that "[a]s soon as he [Michael] was released on 5/26/2019, he made contact with his child." (Presumably, counsel was referring to Michael's May 29 telephone call to mother because there was no evidence that Michael visited or contacted Tommy, who then was not yet three years old.)

Michael did not appear at the hearing on his section 388 petition. His counsel was unable to locate him. Without objection the court dismissed the previously sustained allegations concerning Michael. The juvenile court granted Michael's section 388 petition and set a new dispositional hearing for Michael.

4. *Michael Does Not Appear at the Dispositional Hearing; The Juvenile Court Elevates Him From an Alleged Father to a Presumed Father*

In advance of the dispositional hearing, DCFS reported Michael's whereabouts were unknown except for a four-day period when he was detained by law enforcement. Michael failed

to report to his probation officer. Michael did not contact DCFS to visit Tommy or to inquire as to Tommy's needs.

Michael did not appear at the dispositional hearing he had requested. Michael's counsel had no evidence about whether or how, if at all, Tommy was received into Michael's home. Counsel had "no direction" from Michael about whether Michael wanted to pursue presumed father status.³

Mother testified that Michael stayed with mother and Tommy for one week after he was released from prison in 2016. At that time, mother and Tommy lived with mother's brother. Mother explained: "He [Michael] had just gotten out of prison. And my brother gave him a chance, but it didn't last." Tommy was approximately two months old when Michael stayed in the brother's house for one week.

Counsel for DCFS argued the evidence was insufficient to show that Michael took Tommy into his home, holding Tommy out as his child and providing for Tommy. DCFS's counsel argued that Michael "hasn't done anything active to be a parent in this child's life." Michael's counsel made no argument. Mother's counsel made no argument.

The juvenile court found Michael to be Tommy's presumed father. The court rejected the argument that Michael had not done anything to be a parent to Tommy stating, "That's not what is required under the law." The court found that Michael had satisfied all the elements of Family Code section 7611,

³ Michael had the burden to establish by a preponderance of the evidence that he was entitled to presumed father status. (*In re T.R.*, *supra*, 132 Cal.App.4th at p. 1210.)

subdivision (d).⁴ When the juvenile court asked Michael’s counsel if he was seeking custody of Tommy, counsel responded, “I have no direction, Your Honor.”

DISCUSSION

“The Uniform Parentage Act ([Fam. Code,] § 7600 et seq.) (UPA) distinguishes presumed fathers from biological and alleged fathers. [Citation.] Biology is not determinative of presumed fatherhood. [Citation.] Mothers and *presumed* fathers have far greater rights. [Citation.] A father is not elevated to presumed father status unless he has demonstrated a ‘commitment to the child and the child’s welfare . . . regardless of whether he is biologically the father.’” (*W.S. v. S.T.*, *supra*, 20 Cal.App.5th at p. 143.)

Family Code section 7611 governs methods of establishing presumed fatherhood. The overarching purpose of section 7611 is to “‘distinguish between those fathers who have entered into some familial relationship with the mother and child and those who have not.’” (*In re T.R.*, *supra*, 132 Cal.App.4th at p. 1209.) Section 7611, subdivision (d) creates a rebuttable presumption of presumed fatherhood if “[t]he presumed parent *receives the child into his or her home* and openly holds out the child as his or her natural child.” (Fam. Code, § 7611, subd. (d), italics added.) “[T]o receive a child into his or her home, a parent *must* ‘demonstrate a parental relationship, however imperfect.’” (*W.S. v. S.T.*, *supra*,

⁴ DCFS timely appealed from the juvenile court’s order finding Michael to be a presumed father. Only mother filed a responding brief. We assume for purposes of this appeal only that mother has standing to file such a brief in support of Michael’s status as a presumed father.

20 Cal.App.5th at p. 145.) “[R]eceipt of the child into the home must be sufficiently unambiguous as to constitute a clear declaration regarding the nature of the relationship, but it need not continue for any specific duration.” (*Charisma R. v. Kristina S.* (2009) 175 Cal.App.4th 361, 374, disapproved on another ground in *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 532, fn. 4.)

A. No Substantial Evidence Supported the Juvenile Court’s Order that Michael Received Tommy Into His Home

This court reviews a juvenile court’s finding that a father qualifies as a presumed father for substantial evidence. (*In re D.M.* (2012) 210 Cal.App.4th 541, 549.) “[W]e review the facts most favorably to the judgment, drawing all reasonable inferences and resolving all conflicts in favor of the order. [Citation.] We do not reweigh the evidence but instead examine the whole record to determine whether a reasonable trier of fact could have found for the respondent.” (*In re Spencer W.* (1996) 48 Cal.App.4th 1647, 1650.)

Here no substantial evidence supported the finding that Michael had received Tommy into his home, an element of presumed fatherhood under Family Code section 7611, subdivision (d), the only statute at issue in this case. Interpreting the evidence in the light most favorable to the juvenile court’s order, it shows that Tommy lived with Michael for a two-month period when Tommy was an infant. Even if Tommy lived with Michael for a two-month period in 2016 (or a one-week period as mother testified), “the child’s physical presence within the alleged father’s home is, by itself, insufficient under section 7611, subdivision (d). (*W.S. v. S.T.*, *supra*,

20 Cal.App.5th at p. 145; *R.M. v. T.A.* (2015) 233 Cal.App.4th 760, 776.)

In his unsworn parentage questionnaire, Michael represented that he attended doctor's appointments, recreational activities, and provided some necessities such as diapers and clothes. Arguably, Michael's statements are so conclusory as to lack any evidentiary value. Michael completed the parentage questionnaire five days after being released from a lengthy prison sentence that lasted at least two years. Michael additionally served other prison sentences and it was undisputed that Michael had a 28-year criminal history. At the time Michael completed the questionnaire, Tommy was two years, nine months old. Although Michael states that he attended doctors' appointments and recreational activities, he identifies no specific doctor's appointment or recreational activity, and none that he could have attended during his incarceration. The record contains no evidence that Tommy, who was under three years old, participated in "recreational activities." Michael states that he provided "clothes, diapers [and] childcare products" without identifying any time period when he could have done so and what childcare products he purchased for Tommy. " '[I]f the word "substantial" [is to mean] anything at all, it clearly implies that such evidence must be of ponderable legal significance. Obviously the word cannot be deemed synonymous with "any" evidence. It must be reasonable . . . , credible, and of solid value ' " (*Kuhn v. Department of General Services* (1994) 22 Cal.App.4th 1627, 1633.)

Even if we were arguendo to assume that Michael's statements have evidentiary value and were credited, Michael's representations demonstrate *no* evidence that he shared a

relationship with Tommy. No evidence in the record shows that Tommy knew Michael, let alone knew him as a parent. No evidence supported the conclusion that Michael had a commitment to Tommy. Michael did not even show up at the hearing to determine whether he should be elevated to presumed parent status. Michael was not present in Tommy's life while incarcerated and was not present other than on one phone call to mother after he was released from prison. Because there was no evidence that Michael had a relationship or commitment to Tommy, the juvenile court erred in elevating Michael to presumed father status. (*In re M.R.* (2017) 7 Cal.App.5th 886, 898 ["While the juvenile court may consider a wide range of factors in making a presumed parent determination, as appropriate to the circumstances [citation], the core issues are the person's established relationship with and demonstrated commitment to the child."].)

B. Mother's Arguments Are Unpersuasive

On appeal, Mother argues that there was evidence that Michael "lived with Mother and T. for two months following T.'s birth, provided physical and financial support, held the child out as his own, purchased layette items necessary for T.'s care, attended medical appointments, and engaged in recreational activities with T." Mother further argues this was "not a case where the parent never lived with the child, provided financial support, or attended to the child's medical or physical needs."

Mother's appellate argument conflicts with her statements to social workers, her statements on her parentage form, which she signed under penalty of perjury, and her testimony under oath at the dispositional hearing. Mother expressly testified Michael and Tommy lived in the same home for only one week

when Michael stayed at mother's brother's home upon being released from prison. In November 2018, mother stated that she had no contact with Michael for "over two years." Mother emphasized that Michael was "never" in Tommy's life. Mother also reported that "when she was pregnant [Michael] was incarcerated and has not had any contact with his son Tommy." Mother stated that Michael "does not provide for the child Tommy." Mother further stated under penalty of perjury that Michael never received Tommy into his home, never paid for Tommy's necessities of life, and never had a relationship with Tommy.

In any event, the sole evidence mother cites in support of her argument is Michael's unsworn statement regarding parentage. As we have explained, Michael's statements that he attended doctor's appointments, recreational activities, and provided diapers and clothes do not constitute substantial evidence to support the finding that he was Tommy's presumed father.⁵ That evidence, even if it were credited, does not demonstrate that Michael had a relationship or commitment to Tommy.

⁵ Because we conclude the juvenile court's order is not supported by substantial evidence and must be reversed on that ground, we need not consider the parties' remaining arguments.

DISPOSITION

The juvenile court's order finding Michael to be Tommy's presumed father is reversed.

NOT TO BE PUBLISHED.

BENDIX, J.

We concur:

ROTHSCHILD, P. J.

SINANIAN, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.